No. 2733

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HENRY C. CUTTING

Appellant

vs.

HENRY J. WOODWARD, FRANCIS A. WOODWARD, and THE MONETARY TRUST COMPANY, a corporation

Appellees

Appellant's Brief

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF CALIFORNIA, SECOND DIVISION

JACOB M. BLAKE
Solicitor for Appellant

No. 2399

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HENRY J. WOODWARD, FRANCIS A. WOODWARD, and THE MONETARY TRUST COMPANY, a corporation,
Appellees.

APPELLANTS' BRIEF

Appeal From the District Court of the United States for the Northern District of California, Second Division

Statement of the Case

This is a stockholder's suit brought by the plaintiffs, citizens of Illinois, against Henry C. Cutting and The Monetary Trust Company, a California corporation, for the purpose of having a transfer of 1175 shares of the capital stock of the Point Richmond Canal and Land

Company from the Trust Company to the appellant Cutting, its President, declared fraudulent and void, and for a general accounting between The Monetary Trust Company and Cutting. The plaintiff, Henry J. Woodward, alleges that he is the equitable owner of 600 shares of the stock of the Monetary Trust Company of the par value of $100.00 per share, which the books of the company show stands in the name of one H. B. Mayo; and the plaintiff, Francis A. Woodward, alleges that he is the legal owner of 5 shares of the stock of the defendant company. The ownership of this stock is denied by the defendant. All of the allegations of the Complaint, which are made necessary by Rule 27, Rules of Equity governing the practice in such cases in the United States courts, are likewise denied. It is also alleged and denied that the directors and officers of The Monetary Trust Company, alleged to be under the control of the appellant Cutting, *are not bona fide owners and holders of any shares of capital stock in said Company other than the shares which Cutting has caused to be issued to them to qualify such officers in accordance with the By-Laws of the Company.*

The gravamen of the suit consists of the charge of constructive fraud arising out of the sale and transfer in December, 1906, by The Monetary Trust Company of the stock in controversy under allegations in the bill that the sale was not authorized by a valid resolution of the Board of Directors.

The Complaint also alleges that Cutting for many years prior to the filing of the suit by plaintiffs had been operating his private business and charging the cost and expenses thereof to The Monetary Trust Company, as

well as with having bought large amounts of office supplies and furniture for his private use and charging the same to the company, and otherwise charges him with misapplying, misappropriating and dissipating all of the assets of the company. It is also alleged that after the organization of The Monetary Trust Company it undertook to organize and promote the Point Richmond Canal and Land Company, and in so doing became the owner of an option or contract to purchase four hundred acres of land at or near Point Richmond, California, for $336,000 out of $400,000 worth of bonds to be issued by the Point Richmond Canal and Land Company, and secured by a mortgage upon such real property. It is alleged that the appellee, The Monetary Trust Company, obtained such option from Harry B. Mayo and Fred Reichert under an agreement that all of the capital stock of The Point Richmond Canal and Land Company, amounting to 5000 shares of the par value of $100.00 per share should be issued one-fourth to Reichart, one-fourth to Mayo, and one-half to The Monetary Trust Company; also that $64,000 worth of bonds of The Point Richmond Canal and Land Company were to remain in its treasury to be used in developing the property. It is also alleged that subsequent to the agreement relating to the division and distribution of the stock of The Point Richmond Canal and Land Company, the Trust Company turned over and delivered to one A. N. Lewis, 150 shares of the stock of the land Company, leaving it the owner of 2350 shares of the stock of the former company; that immediately after this transaction, the appellant Cutting proposed to the Trust Company that he would finance the Point Richmond Canal and Land Company and furnish all the funds

necessary to develop and sell said land provided he could obtain the control of the Land Company; that he would buy $10,000.00 worth of treasury bonds of the latter company, and when that money was spent, he would raise whatever further amount might be necessary; that the Trust Company accepted said proposal, delivered 2350 shares to Cutting, whereupon Cutting procured from other sources sufficient other stock to give him the control of the Land Company; and that he paid nothing for Land Company stock, has utterly failed to carry out his agreement to buy $10,000 worth of said bonds and to finance the Land Company. The answer of the defendants admits the organization of the Land Company, the purchase of the real property by it, and the issuance of the bonds as alleged. It denies that the Trust Company ever transferred any shares of the Land Company's stock to Lewis, or that it ever became the owner of 2350 shares of that Company's stock, or that the appellant Cutting ever agreed to finance the Land Company upon obtaining control of its stock, or that the Trust Company ever delivered to Cutting the one-half (1175 shares) of its stock in the Land Company in the manner alleged. It denies that the Trust Company ever obtained an option or contract from H. B. Mayo to buy the real property at Point Richmond as alleged, but admits that Cutting came into a control of a majority of the stock of the Land Company through purchases from other sources. The appellant further denies that he paid nothing for the stock, or failed to carry out his agreement to purchase $10,000.00 worth of bonds of the Land Company, or that he failed to finance the Land Company after he obtained control of it. There are special denials in the answer of

all the charges of fraud and deceit charged in the bill.

The decree of the Court found that the contract purporting to have been entered into on or about December 20, 1906, between the Board of Directors of the Trust Company and Cutting for the transfer to the latter of 1175 shares of stock of the Land Company was fraudulent and void, and vested no title in the latter, but that said "*stock still remains the property*" of the Trust Company, "and that the latter is entitled to have said shares restored to its name upon the books of said Point Richmond Canal and Land Company;" and that Cutting should account for the profits, if any, derived from said stock.

It was further adjudged that the defendant Cutting should account to the Trust Company "for all moneys due and owing, if any found," "for and on account of that certain other 1175 shares of the capital stock of said Point Richmond Canal and Land Company sold and transferred by said Monetary Trust Company to said defendant previously to said 20th day of December, 1906, and likewise he should account for "any and all bonds evidences of indebtedness, and interest, or income therefrom and of all other property of every kind of said Monetary Trust Company, if any which may be found to have been taken" by him as well as for any sums misappropriated, or misapplied by the said Cutting as an officer of the Trust Company.

The Monetary Trust Company was organized March 14, 1904, by H. G. Mayo, Dan Van Wagenen, Albert Betz, H. W. Wernse and W. J. Morgan, who were the directors for the first year. The capital stock of the company was $1,000,000.00 divided into 10,000 shares of the par value of $100.00 per share, and its powers were to accumulate

the funds of its stockholders and those of sinking and trust funds placed in its care, and generally to do a trust company business, excluding the taking of general deposits. The basis of its first stock issue is outlined in a letter from General Hart where in consideration of 2000 shares ($200,000.00 worth) of paid up stock he agreed to assign; (*a*) a certain option contract authorizing him to make a loan of 8,000,000.00 yen, Japanese money to the Japanese Government, together with all commissions and emoluments to arise therefrom: (*b*) to sell and assign all commissions to arise from a certain contract with George W. Brown, M. E., the California Gold Recovery Company, a corporation, and the owner of the Canon Placer Mining claims on the Hassayawpa River, and tributaries, in the County of Yarapai, Territory of Arizona: and (*c*) to turn or cause to be turned over certain business of the Investors Protective Bond & Trust Company, (Trans. pp. 130, 131, 132). The organization of the Trust Company took place in this manner before the appellant Cutting acquired any interest therein.

The Point Richmond Canal & Land Company was organized in the 14th day of July, 1904, by Frederick Reichart, A. N. Lewis, H. B. Mayo, H. W. Wernse and H. C. Cutting who became the directors for the first year. (Trans. p. 184.) The Company was formed upon the basis of a contract to buy the real property at Point Richmond which had been obtained by *Reichart* from the Mintzer and Tuzberry estates, (Trans. pp. 184, 194), and it was not until September 12, 1904, that the Land Company was fully organized by the issuance of all the stock, except that qualifying directors, to Reichart and the opening up of its general books. (See Stock certificate book

Stubs, S. of E. p. 271; Journal of Land Co., S. of E. p. 284).* By an informal oral agreement between the Land Company and the Trust Company, which was afterwards abrogated (See minutes of Trust Co., S. of E. page 191) also Mayo's testimony (Trans. p. 167) and was never made a matter of record by the Trust Company, the latter agreed to pay the organization expenses, of the Land Company and promote the sale of its bonds in consideration of a stock interest in the Land Company. It was thought by both companies that between eight and ten thousand dollars would be sufficient for improvements on the land, in order to effect sales of the treasury bonds and the subdivisions at Point Richmond, (Trans. p. 187). In March, 1905, the Trust Company had made no headway with its work of financing the Land Company and at meeting of the Board of Directors of the Trust Company held March 27, 1905, the Trust Company agreed to receive 1175 shares of Land Company stock from Mr. Reichart in discharge its claims against the Land Company under the previous oral agreement, (Trans. pp. 165, 167). The whole amount which had been laid out by the Trust Company in organization expenses of the Land Company did not exceed $1,000 (Trans. p. 157). On the 3d day of May, 1905, the appellant Cutting entered into an agree-

* There has been omitted from the transcript photographic copies of books, papers, and other exhibits, which are stipulated to be a part of the record in this case and which are here referred to by the page number of the statement of the evidence as filed in the lower Court. Besides the original documents which we will bring up under rule 14, we desire to have for the use of the Court, the photographic copies in the original statement of the evidence lodged in the lower Court, and the same matter contained in the Clerk's Transcript of the record in file in this Court. We will refer to these documents throughout both by description and by page number of the original statements of the evidence.

ment with Reichart who was then the owner of the three-fourths of 5000 shares of stock of the Land Company, less the Lewis stock and ten qualifying shares to each of the directors, to give the former 2350 shares in consideration of his purchase of 27 Treasury bonds of the Land Company for $10,125, or at the rate of $375.00 per bond of $500.00 face value, (Trans. pp. 189, 190).

With the expenditure of this money by the Land Company it was found that more money would be necessary before the property at Point Richmond could be put on the market, and the appellant Cutting refused to buy any more bonds from the Land Company, except upon the condition that other stockholders would take their *pro rata* share of them. At this time in the fall of 1906, the property was inaccessible swamp land near the unincorporated town of Richmond in Contra Costa County, a ship canal would have to be dug to the property and the land filled above high water mark before it would become salable. The improvements would cost in the neighborhood of $150,000.00 and the whole property lay under a mortgage of $400,000.00, $336,000 of the bonds being outstanding against the Land Company to mature January 1st, 1915, (Trans. pp. 197, 198). It was stated by a disinterested witness, Mr. Wall, that in his opinion the land had no value above the mortgage in the fall of 1906 (Trans. p. 200). The appellant used his utmost effects in the fall of 1906 to finance the further development of the Land Company's property and asked the Trust Company to stand an assessment on the 1175 shares of Land Company stock owned by it together with his, to buy its *pro rata* shares of the Treasury bonds. He applied likewise to Dr. Lewis to come in on the financing of the Land

Company and when his effects in this behalf failed, he took an option on the one-quarter interest in the stock of that Company still held by Reichart and on 250 shares of stock hled by Dr. Lewis, at a price of $1.00 per share. (Trans. pp. 190, 194) (Plff's Ex. B., S. of E. p. 160) (Plff's Ex. C., S. of E. p. 161). It was probably between the date of taking the option from Reichart on August 29th, 1906, and the date of the Lewis option on November 5th, 1906, that the Executive Committee of the Trust Company, acting through its Chief Counsel, Gen. Hart, and the Trust officer Mr.Wernse, (Mr. Cutting being the other member), gave Mr. Cutting the option to purchase the 1175 shares of the Land Company stock owned by the Trust Company at the same price per share, (Trans. pp. 215, 216, 235). The first mention of this transaction in the books of the Trust Company is in the minutes of a stockholders' meeting on November 10, 1904. The record of this meeting is imperfect in regard to notice. At a prior meeting of the Board of Directors, held September 3, 1906, a resolution was passed reciting the fact that the annual meeting of stockholders had not been held, and directing it to be held in September 29, 1906. The minutes of the meeting of November 10th, 1906, merely recite that it was held "pursuant to adjournment." At this meeting, however, it appears from the minutes that Mr. Wernse offered for ratification the following option given H. C. Cutting, and upon motion of Mr. Wernse seconded by Mr. Betz, approved by the following votes, Mr. Wernse, representing 505 shares, W. J. Morgan representing 65 shares, Albert Betz representing 55 shares, H. C. Cutting, H. W. Wernse proxy, representing 753 shares being more than a majority of the shares issued."

At the same meeting "All actions of the Board of Directors and its officers since the last stockholders' meeting, were unanimously ratified, approved and confirmed." (Minutes of Trust Co., S. of E. pp. 193, 194.)

At a meeting of the Board of Directors of the Trust Company held on December 20, 1906, the minutes show that "Mr. H. W. Wernse, presented the check of H. C. Cutting for $1175, stating that Mr. Cutting desired to exercise his right under the option given him by the Monetary Trust Company, ratified and confirmed by the stockholders at their last meeting, to purchase 1175 shares of Point Richmond Canal and Land Co., stock held by the Monetary Trust Company at $1.00 per share. On motion of Mr. W. J. Morgan (under the advice of the Chief Counsel) and carried unanimously the cashier was ordered to deliver to H. C. Cutting the certificate for 1175 shares of Point Richmond Canal and Land Co., stock for $1175 as per the option." There were present at this meeting but three out of the five members of the Board of Directors, including the appellant Cutting, the President of the Company; Mayo and Betz being absent. (Minutes of Trust Co., S. of E. p. 194.) The appellees contend that the sale of this stock was void for constructive fraud growing out of the fact that Cutting was disqualified to vote upon a resolution authorizing the sale thereof to himself, and that his presence being necessary to constitute a quorum, there was no legally constituted board present for that purpose at the meeting of December 20, 1906. The check referred to was never cashed, but the evidence shows that it was held for some time as a cash item and subsequently on June 1st, 1907, was turned into a loan for which Cutting gave his note. The

transaction was first entered in the books of the Trust Company on February 28th, 1907, simultaneously with the transfer of all the outstanding stock of the Land Company, of which Cutting now considered himself the owner. (Cash book of Trust Co., S. of E. p. 229; Stock Certificate book of Land Co., of E., p. 279). The presumption may be fairly indulged that the Trust Company did not deliver the 1175 shares in question to Cutting until that day. The delay in making these entries is explained by the fact that for over a year following the fire, the books of the company were in a safety deposit vault and were only visited periodically.

At the time of the sale and to and including the date of filing this suit Mr. Cutting was the owner of 753 shares of stock of the Trust Company; W. J. Morgan owned 65 shares. Albert Betz 55 shares, H. W. Wernse 505 shares (Minutes of Trust Co., S. of E. p. 194). Mayo 100 shares, Francis A. Woodward 5 shares; Mayo also had in his name 400 shares, here claimed by Henry J. Woodward as the equitable owner; and General Hart had in his name, or subject to be issued to him, 300 shares which was held by the Trust Company and in its possession as collateral to his note for $1,000.00 (See Bill & Answer, Trans. pp. 14, 49); Cutting's interest, therefore, was but a little more than one-third of 2183 shares of issued stock. This total may not be exact as the Trust Company did not keep a Stock Ledger or Journal, but it is approximately correct as is admitted by the pleadings and shown by the evidence of all the parties. Of the 753 shares held by Cutting 305 shares were issued him out of Trustee stock which had been issued to Wernse under an arrangement by which the original promotion stock had been can-

celled and certain stock had been issued to him in consideration of the transfer of stock in the El Dorado Basin Gold Dredging Company as shown by the minutes of the meetings of the Trust Company of December 17, 1904, and January 7th, 1905 (S. of E., pp. 189-190). It will be noted that the motion made at the meeting of December 17th, 1904, was by Mr. Cutting that the stock issue of the Trust Company be placed on a dollar for dollar basis. The Ledger of the Trust Company has been lost, but a reference to the original entries made in the Cash Book and Journal of the Trust Company will show that Mr. Cutting has paid in cash for the balance of the stock standing in his name (448 shares) the sum of $4528.75, or an amount entitling him to the issue of five additional shares of the Trust Company stock. We will hereinafter set forth a summary of the entries contained in the Cash Book and Journal of the Trust Company which will show the dates and amounts of these payments; the last payment having been made on September 1st, 1906, or three months previously to the alleged fraudulent purchase of the 1175 shares of Land Company Stock. It is admitted that the only cash subscriptions to the stock of the Trust Company were Mayo's and Cutting's, that they were both in an amount of $5,000 each, and were to be paid for only as the Trust Company needed the money for use in its business. A reference to the Cash Book and Journal of the Trust Company will show that Mayo's subscription was paid in the same manner in which Cutting paid his, as will be hereafter more fully shown.

The record is clear throughout that the purchase and the manner of the payment for the 1175 shares of Land

Company stock by Cutting was openly discussed both before and after December 20, 1906. Mayo, by his own admission, knew of it the day following the meeting. The record shows it was expressly approved by Wernse, Betz, Morgan and Hart. The new relationship affected by the transfer of all the issued capital stock of the Land Company to Cutting, including the Reichart and Lewis stock, was known to all the parties and has been acquiesced in since December, 1906, to the date this suit was brought, (February 19, 1913). In fact, assuming that notice to Mayo is notice to the appellees, the Woodwards, the record will show there was not a single stock interest, either legal or equitable, connected with the Trust Company which has not had notice sufficient to work an estoppel against the Trust Company (Trans. pp. 146, 172, 173, 174, 222, 226, 232).

There is no evidence of control or domination of these independent stock interests by Cutting. The evidence is all the other way (Trans. pp. 222, 223, 224, 227, 228, 230, 233.)

The testimony does not sustain the contention that the Trust Company was not doing business on its own account prior to December 20, 1906. Its business was languishing but it put through the Pacific Underwriting transaction after the fire in 1906; (Trans, p. 238) and with the acquiescence of the stockholders it has drifted into a thoroughly moribund condition with its assets in the admitted condition shown by the pleadings.

It will not be contended that the record contains a scintilla of evidence that any demand has ever been made upon the Board of Directors by the appellees, the Woodwards, either directly or through Mayo, or upon any of

the stockholders of the Trust Company, that an action be brought to set aside the sale of the 1175 shares of the Land Company stock in question, or for an accounting on behalf of the Trust Company against the appellee Cutting, as required by Equity Rule 27. Mr. Cutting admits his obligation to repay the money evidenced by his note to the Trust Company, with interest, (Trans. p. 234), but denies that the company, in the absence of a showing of actual fraud is entitled to an accounting for moneys paid out by way of its legitimate expenses while a going concern.

Finally with the knowledge of all parties concerned in the Trust Company, Mr. Cutting from December 20, 1906, to the date of bringing this suit has continued in the sole and exclusive management of the Land Company, in reliance upon the *bona fides* of the transaction of that date. He expended over $50,000 in the improvement of the real property of the Company at Point Richmond before anything was realized from the sale of lots. During all of this time the appellees have stood by and confirmed the apparent validity of the transaction by which both the stockholders and the directors of the Trust Company attempted to ratify the action of the executive committee in giving Mr. Cutting the option to buy the stock in controversy, by their failure to disaffirm the same within a reasonable time. In addition they have stood by and allowed the appellant to so change his position with respect to his interests in the Land Company that it will be impossible to return to the *statu quo* of the respective parties as of that date without indescribable hardship and loss to him and to the great detriment of innocent third parties. We confidently believe that, in the absence of a

clear proof of actual fraud, such a result is not contemplated either in law or equity and that the judgment of the lower court should be reversed, and the bill dismissed for want of equity.

Specifications of Error

The defendant above named, Henry C. Cutting, asserts, that in rendering the decree in the above entitled cause on the 6th day of October, 1915, the said District Court erred in the following particulars, to-wit:

In overruling the motion of the defendant, Henry C. Cutting, to dismiss complainants' Third Amended Bill of Complaint.

II

In finding that the complainants were, or either of them, was, a share-holder in their or his own right in the defendant, The Monetary Trust Company, at the time of the contract of sale of 1,175 shares of the capital stock of the Point Richmond Canal & Land Company by the Trust Company to the said Cutting on or about the 20th day of December, 1906.

III

In finding that this suit was not a collusive one to confer on a Court of the United States, jurisdiction of a case of which it would not otherwise have cognizance.

IV

In finding that the complainants, or either of them,

had made any efforts in good faith, or at all, to secure the action they desire on the part of the managing directors of the Monetary Trust Company, and had failed therein.

V

In finding that the complainants, or either of them, had made any efforts in good faith or at all, to secure the action they desire on the part of the other shareholders of the Monetary Trust Company, and had failed therein.

VI

In not finding that the complainants, nor neither of them, had no good or sufficient reasons for not making any efforts to secure the action they desire on the part of the managing directors of The Monetary Trust Company or of the other shareholders.

VII

In finding that the complainant, Henry J. Woodward, was ever the equitable owner or holder, for a valuable consideration or otherwise, of six hundred shares, or thereabouts, or of any, of the capital stock of the defendant, The Monetary Trust Company.

VIII

In finding that the complainants, Henry J. Woodward and Francis A. Woodward, or either of them, were ever the legal and beneficial owners of any substantial amount of the capital stock of the Monetary Trust Company, or of any amount there of more than the amount necessary to qualify them as directors of said Trust Com-

pany, and that they were the beneficial owners of such last mentioned amount of stock.

IX

In finding that the defendant, Henry C. Cutting, promised and agreed with the defendant, The Monetary Trust Company, or any of its officers, at the time of or before any stock of said Trust Company was issued to him, or at all, that he would pay into the treasury of said Trust Company ten dollars ($10.00) per share for five hundred (500) shares of said capital stock, and also that he would finance said company and place it in such a condition that it could safely proceed with its business in a proper method and manner.

X

In declaring the contract entered into on or about December 20, 1906, between the defendant, The Monetary Trust Company, the defendant, Henry C. Cutting, for the transfer to the latter of said 1,175, shares of the capital stock of the Point Richmond Canal & Land Company, was and is fraudulent and void, and vested no title to said shares of stock in the said Cutting, but that said shares of stock still remain the property of the Monetary Trust Company, and that the latter is entitled to have said shares restored to its name upon the books of said Point Richmond Canal & Land Company.

XI

In declaring that the defendant, Henry C. Cutting, has no title or right of property in or to the income, profits, dividends, or benefits of any character received by, or

derived to his benefit from or on account of said 1,175 shares of the capital stock of said Point Richmond Canal & Land Company since the transfer thereof as aforesaid, or while the same has stood in his name; and that the complainants, on behalf of the defendant, The Monetary Trust Company, are entitled to have an accounting from the defendant, Henry C. Cutting, of all such profits, dividends, or benefits, if any.

XII

In finding that the defendant, Henry C. Cutting, has conducted his private business affairs with and through the instrumentality of the employees and officers of the defendant, The Monetary Trust Company, and has fraudulently and wrongfully caused his own private stenographer to be paid out of the assets and property of said Trust Company.

XIII

In finding that the defendant, Henry C. Cutting, has fraudulently caused the defendant, The Monetary Trust Company to purchase a large amount of choice furniture, and make elaborate and expensive changes in the interior of the offices of said Trust Company for the sole, or any, use or benefit of the said Cutting.

XIV

In finding that the defendant, Henry C. Cutting, has unlawfully, fraudulently, or at all, misapplied or misappropriated any money, funds, securities, profits or properties of the defendant, The Monetary Trust Company.

XV

In finding that the defendant, The Monetary Trust Company, was ever the legal or equitable owner or holder of any other 1,175 shares, or of any share or number of shares of the capital stock of the Point Richmond Canal & Land Company, other than the 1,175 shares thereof first hereinbefore mentioned, or that said Trust Company was ever the legal or equitable owner or holder of any bonds, stocks, securities or other property, real, personal, or mixed, issued by or formerly the property of the Point Richmond Canal & Land Company, other than 1,175 shares of stock last aforesaid.

XVI

In finding that the defendant, Henry C. Cutting, ever proposed to the defendant, The Monetary Trust Company, that he would finance, and furnish all the funds necessary to develop and sell the lands of the Point Richmond Canal & Land Company; or that he would buy Ten Thousand Dollars ($10,000.00) worth of the bonds of the Point Richmond Canal & Land Company, and that when that amount was spent he would raise whatever further amount of money might be necessary; or that the Monetary Trust Company accepted such a proposition.

XVII

In finding that the defendant, Henry C. Cutting, has been guilty of any fraud, deceit or misrepresentations as the president, or a director, or a stockholders of the defendant, The Monetary Trust Company, or as an individual, in any transaction had by him, or in which he has

participated, for and on behalf of said Trust Company, or with it in his personal capacity.

XVIII

In declaring that the plaintiffs, for and on behalf of said Monetary Trust Company, are entitled to an accounting from the defendant, Henry C. Cutting, of all moneys due and owing if any be found, from said Cutting to said Trust Company for and on account of any other 1175 shares of the capital stock of said Point Richmond Canal & Land Company, alleged to have been sold and delivered to the said Cutting by said Trust Company prior to said 20th day of December, 1906, and likewise to a full accounting of any and all bonds, evidence of indebtedness, and interest or income therefrom, and of all other property of every kind of The Monetary Trust Company, if any, which may be found to have been taken or have come into the possession of said defendant, Henry C. Cutting, and of any and all sums of money or funds of said Monetary Trust Company paid, laid out or expended by or on behalf of said Cutting on account of office or room rents, or other expenses of any character, or of any sums of money whatsoever belonging to said Monetary Trust Company in anywise appropriated to the use or benefit of said defendant, Henry C. Cutting, and generally to an accounting of all financial or money transactions of any and every character had and occurring between said Trust Company and the said Cutting during the period covered by the Bill of Complaint.

XIX

In denying the petition for a re-hearing of the de-

fendant, Henry C. Cutting, for the reason that the same, and the affidavits in support thereof, did not state facts sufficient to justify the relief prayed for upon the ground of newly discovered evidence, material to the defense of the said Cutting, and which could not have been known and produced at the trial by the exercise of reasonable diligence.

XX

In denying the petition of the defendant, Henry C. Cutting, for a re-hearing for the reason that the same, and the affidavits in support thereof, did not state facts sufficient to justify the relief prayed for on the ground of accident and surprise occurring at the trial and prejudicial to the defense of the said Cutting, against which ordinary prudence and caution could not have guarded.

Points and Authorities

1. This suit should be dismissed for want of equity under Rule 27, Rules of Equity governing the practice in United States Courts.

(*a*) The record is barren of any proof that the plaintiffs below exerted any efforts to secure the action, which they here seek, on the part either of the managing directors, or of the shareholders of the appellee, The Monetary Trust Company.

Rule 27, Equity rules.
Hawes v. Oakland, 104 U. S., 450, 56, 57, 60.
Huntington v. Palmer, 104 U. S., 483.
Detroit v. Dean 106 U. S., 537-542.
Dimpfell v. Ohio & Miss. R. R. Co., 110 U. S., 209.
Quincy v. Steel, 120 U. S., 245, 247, 248.
Taylor v. Holmes, 127 U. S., 489, 492.

Venner v. Gt. Northern Ry. Co., 209 U. S., 34.
Wathen v. Jackson Oil, etc., Co., 235 U. S., 635.

(*b*) The plaintiffs cannot maintain this suit if the appellee, Trust Company, could not.

Burland v. Earle L. R. App. Cas. (1902), p. 83.
In re Ambrose Tin etc. Co., L. R., 14 Ch. Div., 390.
Davenport v. Dows, 18 Wall., 626.
Hawes v. Oakland, *supra.*
Turner v. Markham, 155 Cal., 570.
Dickerman v. Northern Trust Co., 176 U. S., 181, 188.
Stewart v. St. Louis, etc. R. R. Co., 41 Fed., 736.
Coal Co. v. Trust Co., 127 Fed., 633
Larabee v. Dally 175 Fed., 378.
Lawrence v. Southern Pac. Co., 180 Fed., 825.

(*c*) Stockholders' suits of this nature cannot be maintained to set aside transactions alleged to be fraudulent only upon grounds of constructive fraud. The transaction sought to be annulled must be actually fraudulent or *ultra vires.*

Hawes v. Oakland, *supra.*
Burland v. Earle, *supra.*
Watkins v. Lawrence Nat'l Bk., 51 Kan., 254; 32 Pac., 914.
Metcalf v. Amer. School Furniture Co., 122 Fed., 115.

2. There is no fiduciary relation between a stockholder and the corporation, and he may legally vote his stock at a stockholders' meeting, to ratify a contract in which he is personally interested.

4 Thompson on Corporations, Secs. 4465, 4467.
Northwestern Transp. Co. v. Beatty L. R., 12; App. Cos., 589.
Gamble v. Queens Co. Water Co., 123 N. Y., 91; 25 N. E., 210.
Oil Co. v. Marbury, 91 U. S., 587, 589.
Gas Co. v. Berry, 113 U. S., 322.
Hanchet v. Blair, 100 Fed., 817.

3. The transaction involved in the sale of 1175 shares of Land Company stock by the Trust Company was only constructively fraudulent, if fraudulent at all, and was subject to ratification.

(*a*) The informalities attending the meeting of the stockholders of the company of November 10, 1906, and of the Board of Directors of December 20, 1906, might be properly waived by the corporation.

Thompson on Corporations, Sec. 1143.
Ashley Wire Co. v. Ill. Steel Co., 164 Ill., 149; 45 N. E., 410; 56 Am. St., 187.
Anderson Carriage Co. v. Pungs, 127 Mich., 543.
Nelson v. Hubbard, 96 Ala, 238.

(*b*) The record of a meeting in the book of a corporation is notice to its members.

Ashley Wire Co. v. Ill. Steel Co., *supra*; (56 Am. St. at p. 192).

(*c*) Minutes of proceedings of a meeting of the stockholders of a corporation raise a presumption that due notice thereof was given, and that its proceedings were lawful and regular.

Benbow v. Cook, 115 N. C., 324; 44 Am. St., 454.

(*d*) When a party assumes the burden of showing irregularity in the call or manner of holding a meeting of stockholders, the action of the meeting will nevertheless be declared valid when it appears that every stockholder who did not participate in the meeting afterwards ratified the action.

Benbow v. Cook, *supra*.
Stulz v. Handley, 41 Fed., 531.
Nelson v. Hubbard, *supra*.
Reed v. Hayt, 17 N. E., 418.

4. An estoppel *in pais* has been established against every shareholder in the Trust Company to complain of the sale of the stock in controversy to the appeallant Cutting; and the plaintiff appellees, and the appellee Trust Company are equally guilty of laches.

Oil Co. v. Marbury, 91 U. S., 587, 589.
Gas Co. v. Berry, 113 U. S., 322.
Hanchet v. Blair, 100 Fed., 817.
Hayward v. National Bank, 96 U. S., 611.
Grymes v. Sanders, 93 U. S., 55, 62.
Mackall v. Casilear, 137 U. S., 556, 566.
Mastin v. Noble 157 Fed., 506, 509.
Johnson v. Standard Mining Co., 146 U. S., 360, 371.
Penn Mutual Life Ins. Co. v. Austin, 168 U. S., 685, 697.
Arbuckle v. Kelly, 144 Fed., 277.

Argument

THE RIGHT OF PLAINTIFFS TO MAINTAIN THIS SUIT

In the discussion of Point 1, the several sub-heads can be conveniently grouped together. The last sentence of Rule 27 governing stockholders' bills, and which reads as follows:

> "It (the bill) must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the stockholders, and the causes of his failure to obtain such action, or the reason of not making such effort,"

is directly referrable to the earliest English precedents in such cases. These cases are collected and approved by the Supreme Court of the United States in *Hawes vs. Oakland,* 104 U. S. at pp. 456, 457 and 460. Mr. Justice Miller cites with approval and quotes at length from the

opinion of *James, L. J.,* in *MacDougal v. Gardiner* (1875) 1 Ch. Div., p. 13, to illustrate the reluctance of the Court to entertain a stockholder's bill in the absence of a clear showing of actual fraud, or that the act of the company is *ultra vires,* on the part of the company *qua* company. We desire to call the attention of the Court to the following language of *Mellish, L. J.* at page 25 of the same decision.

> "In my opinion, if the thing complained of is a thing which in substance the majority of the company are entitled to do, or if something has been done irregularly which the majority of the company are entitled to do regularly, *or if something has been done illegally which the majority of the company are entitled to do legally*, there can be no use of having a litigation about it, the ultimate end of which is only that a meeting has to be called, and then ultimately the majority gets its wishes. Is it not better that the rule should be adhered to that if there is a thing which the majority are the masters of, the majority in substance shall be entitled to have their will followed? If it is a matter of that nature, it only comes to this, that the majority are the only persons who can complain that a thing which they are entitled to do has been done irregularly; and that as I understand it, is what has been decided by the cases of *Mozley v. Alston* and *Foss v. Harbottle.* In my opinion, that is the rule that is to be maintained. Of course, if the majority are abusing their powers, and are depriving the minority of their rights, that is an entirely different thing, and there the minority are entitled to come before this Court and maintain their rights; but if what is complained of is simply that something which the majority are entitled to do has been done or undone irregularly, then I think it is quite right that nobody should have the right to set that aside, or to institute a suit in chancery about it, except the company itself" (the italics are ours).

Rule 27 of the new Equity Rules is the same as the former Equity Rule 94, except for the added provision in

the last sentence "or the reason for not making such effort." Both rules had for their object the promulgation of the doctrine laid down in the *English* cases and in *Hawes v. Oakland.*

In drafting the bill, counsel for the appellees, the Woodwards, attempted to bring themselves within the rule of *Doctor v. Harrington,* 196 U. S., 579, and *Delaware and Hudson Co. v. Albany and Susquehanna R. R. Co.,* 213 U. S., 435, setting forth what showing will be considered sufficient to excuse a prior demand for action upon the part of directors or of the stockholders. In our opinion the allegations, upon information and belief, of the complaint that "*none* of" the directors or officers of the defendant, The Monetary Trust Company, who are above alleged to be under the control of the defendant, Henry C. Cutting, are the bona fide owners and holders of any shares of the capital stock of said company, but that sufficient shares of the stock in said company to qualify said officers in accordance with the by-laws of the company, have been issued to each of them by said defendant, Henry C. Cutting, or through his influence or command, in order that he might control a majority of the Board of Directors of said defendant, the Monetary Trust Company, and its officers" is wholly insufficient for that purpose and is not the equivalent in substance or effect to an allegaiton, setting forth with the particularity required by the rule, the facts showing that the *stock control* of the corporation is in the hands of Cutting or of interests adverse and hostile to the plaintiffs' demand.

It seems to us to be a confession, by way of a resort to a species of special pleading, that the stock interests are, as is actually the case, as appears on the face of the bill,

split up into divers interests, none of which are alleged to be controlled by the appellant Cutting. The bill alleges that Genl. Hart owned 300 shares of the stock of the Trust Company. In other words, our contention in this respect is that if the bill only alleges that the officers alleged to be controlled by the appellant are owners of no more stock than is necessary under the by-laws of the Trust Company to qualify them, and there is no allegation that the appellant is the owner of a controlling interest in the company, then no excuse is furnished for not demanding action at the hands of the other stockholders. Under the decisions last referred to, facts are either alleged or shown by the proof which make the resort to the stockholders, after a resort to the directors has proved fruitless, a vain and idle act; but in the absence of any such showing, the rule is uniform that the bill should be dismissed for want of equity.

The following from *Hawes v. Oakland,* is quoted with approval in *Corbus v. Gold Mining Co.,* 187 U. S., at page 462:

> "He must make an earnest, not a simulated effort, with the managing body of the corporation, to induce remedial action on their part, and this must be made apparent to the Court. If time permits, or has permitted, he must show, if he fails with the directors, then he has made an honest effort to obtain action by the stockholders as a body, in the matter of which he complains. And he must show a case, if this is not done, where it could not be done, or it was not reasonable to require it."

The Court goes further (p. 463) and says:

> "It must not be understood that a mere technical compliance with the foregoing rule is sufficient and precludes all inquiry as to the right of the stockholder to maintain a bill against the corporation.

> This Court will examine the bill in its entirety and determine whether, under all the circumstances, the plaintiff has made a showing of wrong on the part of the corporation or its officers and injury to himself as will justify the suit. The directors represent all the stockholders and are presumed to act honestly and according to their best judgment for the interest of all. Their judgment as to any matter lawfully confided to their discretion may not lightly be challenged by any stockholder or at his instance submitted for review to a Court of Equity. The directors may sometimes properly waive a legal right vested in the corporation in the belief that its best interests will be promoted by not insisting on such right. They may regard the expense of enforcing the right of the furtherance of the general business of the corporation in determining whether to waive or insist upon the right. And a Court of Equity may not be called upon at the appeal of any single stockholder to compel the directors or the corporation to enforce every right which it may possess, irrespective of other considerations. It is not a trifling thing to attempt to coerce the directors of a corporation to an act which their judgment does not approve, or to substitute his judgment for theirs."

In *Taylor v. Holmes,* 127 U. S., 489, where a bill in equity was filed to reform a deed given to the corporation, by a stockholder after the charter of the corporation had expired, the Court ruled that such a suit could not be filed without a showing that he had endeavored in vain to secure action on the part of the directors, if there were any, or to have the stockholders elect a new board of directors. The Court said: (p. 492)

> "Although the allegation of the bill is that many of the directors are dead, still it is shown that one of them survives, and no assertion is made that there was any application to this surviving director on the part of the defendants for the purpose of instituting any proceedings looking to the rectification of this deed, or for the recovery of the real estate in North

> Carolina; nor does it appear that there was any request made to him to bring any action on the part of the company, or to elect other directors, or to obtain any united action in the assertion of the claims now set up."

But whether or not the lower court erred in overruling the defendants' motion to dismiss the bill, in the absence of the proof of the allegations required by the rule, the suit should be dismissed for want of equity.

> Venner v. Great Northern Railway, 209 U. S., at p. 54.

The appellant Cutting claims the stock in controversy under an option granted him by the Executive Committee of the Trust Company, composed of the President, Mr. Cutting, the trust officer, Mr. Wernse, and the Chief Counsel, Genl. Hart. The option was signed by Wernse and Hart. Article Xa, of the By-laws of the Trust Company is as follows:

> "Executive Committee
>
> "1st. For the purpose of facilitating the conducting of the business of this Company, there shall be appointed by the Board of Directors an Executive Committee of three presons.
>
> "2nd. The President and Chief Counsel of the Company shall constitute two of said Committee, and the Board of Directors shall elect the third member of said Committee from their number, or may select such other person as may be deemed for the best interests of the Company.
>
> "3rd. Said Committee shall have full charge of and shall conduct and carry on the business of the Company, and report its actions to the Board of Directors at the meeting of the Board held next thereafter."

At the stockholders' meeting of November 10, 1906, the minutes of which are defective for the lack of a recital

of notice, not only was the option in particular ratified and approved, but all the past actions of the Board of Directors and officers were also confirmed, and by a vote of the stock as follows: Wernse, 505 shares; Morgan, 65 shares; Betz, 55 shares; Cutting, (by Wernse proxy) 753 shares; the proof shows Morgan to have purchased his stock at par for cash; Betz is shown to have been one of the original incorporators of the Trust Company, and a member of it long prior to the time when Cutting first became connected with it. This is important to consider from the standpoint of the necessity that the plaintiffs were under to resort to the stockholders for relief before instituting the action in their own names (Trans. p. 203; Plff's Ex. D. S. of E., p. 170).

A more important point in regard to the validity of the transactions had at this stockholders' meeting grows out of the consideration of a principle uniformly adhered to both in England and this country, *viz:* that there is no fiduciary relation between a stockholder and the corporation, and he may vote to ratify a contract between himself and the corporation.

4 Thompson on Corporations, Secs. 4465, 4467.
Northwest. Transp. Co. v. Beatty, L. R., 12 App. Cas., p. 589.
Gamble v. Queen's Co. Water Co., 123 N. Y., 91; 25 N. E., 201.
Oil Company v. Marbury, 91 U. S., 587-589.
Hanchett v. Blair, 100 Fed., 817.
Gas Co. v. Berry, 113 U. S., 322.

The English Court lays down the rule as follows:

> "Unless some provision to the contrary is to be found in the charter or other instrument by which the company is incorporated, the resolution of a majority of the shareholders, duly convened, upon any question with which the company is legally compe-

tent to deal is binding upon the minority, and consequently upon the company, and every shareholder has a perfect right to vote upon any such question, although he may have a personal interest in the subject-matter opposed to, or different from, the general or particular interests of the Company.

"On the other hand, a director of the company is precluded from dealing, * * * on behalf of the company with himself, and from entering into engagements in which he has a personal interest conflicting, or which may possibly conflict with the interest of those whom he is bound by fiduciary duty to protect; and this rule is applicable to one of several directors as to a managing director. *Any such dealing or engagement may, however, be affirmed or adopted by the Company, provided such affirmance or adoption is not brought about by unfair or improper means, and is not illegal or fraudulent or oppressive toward those* shareholders who oppose it" (pp. 593, 594).

In *Gamble v. Queen's County Water Co., supra,* the Court speaking through Mr. Justice Peckham, says:

"A shareholder has a legal right, at a meeting of the shareholders, to vote upon a measure, even though he has a personal interest therein, separate from other shareholders. In such a meeting each shareholder represents himself and his own interests solely, and he in no sense acts as a trustee or representative of others. The law of self-interest has at such times very great and proper sway."

The whole subject we have been discussing has been caught up in one comprehensive statement of the law in the House of Lords decision in *Burland v. Earle,* L. R. App. Cas. (1902) at p. 93, when the Court, speaking through Lord Davey, says:

"It is an elementary principle of law relating to joint stock companies that the Court will not interfere with the internal management of companies acting within their powers and in fact has no jurisdiction to do so. Again, it is clear law that in order to redress a wrong done to the company, the action

should *prima facie* be brought by the company itself. These cardinal principles are laid down in the well-known cases of *Foss v. Harbottle* (1843), (2 Hare, 461) and *Mozley v. Alston* (1847), (1 Ph., 790), and in numerous later cases which it is unnecessary to cite. But an exception is made to the second rule, where the persons against whom the relief is sought themselves hold and control the majority of the shares in the company, and will not permit an action to be brought in the name of the company. In that case the Courts allow the shareholders complaining to bring an action in their own names. This, however, is mere matter of procedure in order to give a remedy for a wrong which would otherwise escape redress, and it is obvious in such an action, the plaintiffs cannot have a larger right to relief than the company itself would have if it were plaintiff, and cannot complain of acts which are valid if done with the approval of the majority of the shareholders, or are capable of being confirmed by the majority. The cases in which the minority can maintain such action are, therefore, confined to those in which the acts complained of are of a *fraudulent character or beyond the powers of the company.* A familiar example is where the majority are endeavoring, directly or indirectly, to appropriate to themselves money, property, or advantages, which belong to the Company, or in which the other shareholders are entitled to participate, as was well alleged in the case of *Manier v. Hooper's Telegraph Works* (1874), (L. R., 9 Ch., 350). It should be added that no mere informality or irregularity which can be remedied by the majority will *entitle the minority to sue if the act when done regularly would be within the powers of the company and the intention of the majority of the shareholders is clear* (the italics are ours).

The plaintiffs' case below was tried upon the theory laid down in *Curtin v. Salmon Railroad Company,* 130 Cal., 345, which in turn rests upon the doctrine laid down in *Wickersham v. Crittenden,* 93 Cal., 17, to the effect that a stockholder may sue in the right of a corporation to set aside a transaction that is *only constructively*

fraudulent, without reference to the ultimate fact that such transaction is not only subject to ratification, but may have in fact been already legally ratified and confirmed. The vice of the California doctrine and virtue of that laid down by the *English* cases and those of the United Supreme Court already cited, will be clearly discerned upon reference to the subsequent case of *Wickersham v. Crittenden,* 110 Cal., 332.

In the original case of *Wickersham v. Crittenden,* it appears that the complainant alleged that he controlled majority of the shares of stock of the Bank of San Louis Obispo, and by virtue of such control he had elected a biddable board of directors, and that at a meeting at which only three out of five directors were present including Mr. Crittenden, a resolution was passed increasing his salary as President; and the Supreme Court of California held upon demurrer to the complaint that the resolution was illegally passed and the transaction could be set aside and vacated at the suit of a stockholder. Following this decision a second action, entitled "*Wickersham v. Crittenden,*" 106 Cal., p. 327, was sustained to compel Mr. Crittenden to account for the excess salary he had drawn under the authority of the invalid resolution. Finally, in the case of *Wickersham v. Crittenden,* 110 Cal., p. 332, the Court sustains the defense of Mr. Crittenden to the action to recover the excess of salary, based upon the doctrine of ratification and estoppel.

In the first *Crittenden* case, the Court arrives at the conclusions that the stockholder may invoke the same remedy which the corporation might, to set aside a transaction which is only constructively fraudulent, from a consideration of the most common equitable doctrine that

Courts will set aside such transaction at the mere option of the *cestui que trust*. Such a doctrine, however, has no application in stockholders' suits because of the recognition which the Courts give to the right of the Board of Directors, in the absence of actual fraud, to ratify and approve such illegal transactions *ad libitum*. This, we respectfully submit, is the doctrine laid down in *Hawes v. Oakland* and *Corbus v. Gold Mining Company,* and it is unquestionably the doctrine of the *English* cases to which the Supreme Court of the United States expressly refers as being its intention to follow (104 U. S., at p. 460).

It seems to us that these propositions are merely corollaries to the principal proposition that a stockholder's suit is purely representative in its nature and can be maintained only to enforce the right of the corporation. The most discursive treatment of this doctrine that we have seen, is found in the case of *Turner v. Markham,* 155 Cal., pp. 569, 570, 571, and, since it bears so particularly upon the facts in the suit at bar, we will quote from Mr. Justice Henshaw's opinion at some length:

> "At the threshold of this inquiry, however, it is proper to pause to point out what is the exact nature of the action before us. In its essence it is an action brought by the corporation itself to recover redress for some legal wrong before us. In its essence, it is an action brought by the corporation itself to recover redress for some legal wrong which the corporation itself has suffered. To prevent a failure of justice, as where the governing Board of Directors or trustees of the corporation refuses to prosecute such an action, the law permits a stockholder to begin and maintain it on behalf of the corporation. But the fact that a stockholder is the nominal plaintiff in such an action, whether he prosecutes it as an individual stockholder or as a repre-

sentative of a class of disaffected stockholders, does not in any manner, or to the slightest extent, enlarge the rights and remedies of the action. The action must still be founded upon some wrong which the corporation, as a corporation, has suffered, and for which, if itself were plaintiff, it could secure legal or equitable redress. Therefore, if the evidence shall establish that the corporation itself has suffered no wrong, cognizable either at law or in equity it will matter not how just and how grievous may be the complaint of the individual stockholder, nor how complete may be the proof of his personal loss, damage or injury. In this action on behalf of the corporation no recovery can be had, and the stockholder will be compelled to proceed by his individual action to obtain a personal recovery (5 *Pomeroy's Equity Jurisprudence,* 3 ed., p. 2125, *et seq.; Cook on Stockholders and Stock,* Sec. 692; *Davenport v. Dows,* 18 Walls., 626; *in re Ambrose, etc.,* L. R. 14 Ch. Div. (Eng.), 590; *Langdon vs. Fogg,* 18 Fed., 5; *Stewart vs. St. Louis R. R. Co.,* 41 Fed., 756; *Foster vs. Seymour,* 25 Fed., 65).

"No conflict arises, or indeed could arise, over so plain a proposition, and it may seem superfluous thus to emphasize it. But it is here emphasized: 1. Because it is all important and to be continually borne in mind in considering the evidence; and, 2. Because of the conviction which an examination of that evidence forces upon us, that, by oversight the learned judge of the Trial Court failed to carry this distinction throughout the case, and erroneously confounded the wrongs and equities of the individual stockholders with the wrongs and equities of the corporation.

"Stripped to its essentials, what then was the condition at the time of the organization of the defendant corporation? It was this: There stood a corporation owning no property, whose stock was, therefore, absolutely valueless. It was perfectly legal and proper for all the parties in interest in such a corporation to do as here they agreed to do—sell all or any part of the stock of the corporation in return for mining claims, or for anything else of value."

With reference to the law governing stockholders' suits generally, we invoke the familiar doctrine that the Courts of the United States will not follow the rules adopted by the state courts in applying principles of general equity jurisprudence, where the jurisdiction of the Court is invoked upon the ground of diverse citizenship.

Johnson v. Waters, 111 U. S., 640-667.
Arrowsmith v. Gleason, 129 U. S., 86-99.
Marshall v. Holmes, 141 U. S., 589-598.
McDaniel v. Traylor, 196 U. S., 415.
See also
Rapple v. Dutton, 226 Fed., 430-433 and cases cited.

Ratification, Estoppel and Laches.

Before taking up these questions, in detail, we desire to call the attention of the Court to the fact that the allegation of the complaint that the plaintiff, Henry J. Woodward, is the equitable owner of 600 shares of stock in the Trust Company has only the oral uncorroborated testimony of the witness Mayo for its support; neither was there any other proof offered of the legal ownership of the five shares of stock alleged to be in his co-plaintiff, Francis A. Woodward. The plaintiffs, residents of Illinois, were not present at the trial, and their depositions were not taken. In this state of the record, we urge that a case is presented for the application of the rule requiring the testimony of two witnesses, or the testimony of one witness, and corroborating circumstances equivalent to another, to overcome a sworn denial in an answer.

Vigel v. Hopp., 104 U. S., 441.
Morrison v. Durr, 122 U. S., 518.
Latta v. Kilbourne, 150 U. S., 524.

The plaintiffs are shown by the record to be cousins of the witness Mayo, who states he sold them the interest

in the Trust Company as alleged in the complaint before Mr. Cutting is shown to have undertaken to buy the $10,000 worth of bonds of the Land Company under his contract with Reichart, dated May 3d, 1905. If the Woodwards were, in fact, the purchasers of this stock, it was unloaded upon them by Mayo at the time the original stock was outstanding, and he took their money from them when there was nothing back of the stock except the contracts, options and agreements to furnish business referred to in Gen. Hart's letter of proposal. Again the cash book and journal of the Trust Company show how Mayo paid in his money for the stock standing in his name and these payments, made at the time and in the manner shown by the books of the Trust Company, are utterly incompatible with his testimony that he paid for the stock with $5,000 cash sent him by Henry J. Woodward.

His testimony on this subject is as follows:

> "Mr. Whitmore: State the facts in reference to the acquisition of that stock by you.
>
> "The Court: The ownership of the stock.
>
> "A. When the company was incorporated by General Hart and myself, we were the owners and promoters of the company; it was agreed that we should each take 500 shares of promotion stock for our services in incorporating the company, and that we were to have the privilege of buying 500 more shares at $10 a share. I told General Hart that I had a client in Peoria, Illinois, that would take my 500 shares, and give us $5,000 for it, a Mr. H. J. Woodward; he sent me $5,000 and I paid it over to the company for the 500 shares.
>
> "Q. Then these 500 shares of stock belong to H. J. Woodward? A. H. J. Woodward, yes, one of the plaintiffs in this case. He resides in Peoria, Illinois. The other 105 shares belong to me. 500 shares belong to M. H. J. Wood-

ward, and five belong to Mr. F. A. Woodward, and 105 to me. For Mr. H. J. Woodward I paid in $3,000 in one thousand-dollar payments. I turned over to the company General Hart's note for $1,000 secured by 300 shares of the stock of the Monetary Trust Company, and for Mr. Woodward I paid in another $1,000 in payments at different times when the company needed the money. On my account, for my own hundred shares, I paid in $1,000, in payments at different times."

The entries which we have taken from the cash book and journal, show payments aggregating $4247.20 to have been made by him as follows:

JOURNAL SHOWS THAT H. B. MAYO paid to MONETARY TRUST CO. the following:

1904

March 26.	Incorporation Expense	$ 57.50

JOURNAL SHOWS THAT H. B. MAYO paid to MONETARY TRUST CO. the following:

1904

April	1.	Office rent	125.00
	30.	Telegrams	11.75
May	2.	Sundries	4.70
"	2.	Office Furniture	360.00
"	31.	Marconi stock	850.00
"	31.	Telegrams	3.25
1905			
Feb.	28.	Wm. H. H. Hart, note	1,000.00
"	"	Interest accrued	210.00
			$2,622.20

CASH BOOK SHOWS H. B. MAYO paid to MONETARY TRUST CO.

1904

June	2.	Cash	$ 200.00
"	11.	"	1,000.00
"	30.	"	30.00
Oct.	26.	"	25.00

1905		
Jan. 10.	"	300.00
Feb. 1.	"	100.00
		$1,655.00
1904		
July 1.	Paid to H. B. Mayo check #17	30.00
		$1,625.00
	TOTAL	$4,247.20

The stubs of the stock certificate book (S. of E. pp. 255-270) show that between the date of the organization of the Company and January 9th, 1905, the latter date being at least three months before the initial financing of the Land Company was undertaken by Mr. Cutting by the purchase of the $10,000 worth of bonds in question—the following amounts of Trust Company stock were issued to Mayo: March 26, 1904, 5 shares; March 30, 1904, 50 shares; January 9, 1905, Certificate No. 12, 100 shares; Certificate No. 14, 160 shares; Certificate No. 15, 220 shares; Certificate No. 16, 90 shares: Total, 505 shares; 400 shares, issued as above, were evidently issued upon the surrender and cancellation of certificate No. 13 for 400 shares on January 9, 1905. The stock book shows no other stock issued to Mayo after that date. Had Mr. Mayo made the payments on this Trust Company stock with money paid him by the Woodwards, he would have been entitled to 300 shares more stock paid for at three different times in installments of $1,000.00 in cash. It is too great a tax upon one's credulity, we respectfully submit, to assume this to be true, for there is not a scintilla of evidence on the part of Mayo that there is any stock due either him or the Woodwards; in fact, while they to-

gether claim 610 shares, the stock certificate book shows that only 510 shares were ever issued; 505 shares to Mayo and 5 shares to Francis A. Woodward, *with no testimony whatever in the record, that the latter continues in the ownership of his stock.* There is no presumption to be indulged that after the policy of the company was changed in the matter of not issuing stock except as paid for there is any more stock coming to Mayo; especially since the stock already issued to him amounts to more than his payments.

It was not until March 27, 1905, nearly three months later, that the Trust Company became vested with any tangible stock interest in the Land Company, when it received 1175 shares, or one-quarter of the whole authorized issue after deducting the qualifying shares to directors and the Lewis stock. Mayo claims he was a partner of Reichart in obtaining the original contract of purchase of the Point Richmond lands from the Mintzer and Tuxbury estates. This is conclusively negatived by the fact that if he had been he would have insisted on putting this interest in with the Monetary Trust Company and have demanded the issue to himself of promotion stock at the time Wernse and Hart obtained theirs in consideration for turning in the El Dorado Gold Dredging Company's stock (minutes of meeting of Directors of Trust Company, January 7, 1905). This transaction was had at a meeting at which Mayo was present and two days later we find him accepting the issuance of approximately 450 shares of Trust Company stock for which he had already paid cash. At that meeting the following resolutions were unanimously adopted:

> "H. B. Mayo proposed to the Board of Directors to turn in on account of his subscription, the note of

W. H. H. Hart, for one thousand dollars ($1,000) together with the accrued interest credited to him on account of his subscription for five hundred (500) shares of the Capital Stock of the Company and that he would pay sufficient more to make full payment for the said five hundred (500) shares at Ten Dollars ($10) per share together with what he had already paid. Said note of W. H. H. Hart to be secured by one hundred thousand (100,000) shares of Eldorado Basin Gold Dredging Company's stock and three hundred (300) shares of the capital stock of the MONETARY TRUST COMPANY.

"Upon motion of W. J. Morgan seconded by F. A. Woodward the resolution was unanimously adopted.

"Be it further resolved that the President and Secretary of this Company be and are hereby authorized to issue eleven hundred and fifty shares (1,150) of stock for one hundred thousand (100,000) shares of Eldorado Basin Gold Dredging Company's stock transferred to this Company the day of . Said stock being taken at the rate of eleven and one-half (11 1/2) cents per share.

"Upon motion of W. J. Morgan seconded by F. A. Woodward the resolution was unanimously adopted" (Minutes of Trust Co., Jan. 7, 1905, S. of E., p. 190).

It is a noteworthy fact that the plaintiff, Francis A. Woodward was present at that meeting.

In the light of the foregoing, we have no hesitancy in characterizing the following testimony of Mayo and the inference he would seek to have drawn from it as being absolutely devoid of truth:

"The Court: Q. But you say that the 1,000 shares of so-called promotion stock, that went, 500 shares to you and 500 shares to General Hart, was afterwards cancelled. A. When Mr. Cutting came in he objected to that, and I consented that my interest in it be cancelled; that is, he returned to the treasury. While I had put in the Point Richmond proposition into the Monetary, which was the only piece of business they ever had that brought them anything that amounted to anything yet, at the same time Mr. Cutting was willing to allow Mr. Hart to put

in 100,000 shares of El Dorado Basin Gold Dredging Company stock which we all knew at the time was absolutely worthless; General Hart was allowed to put that certificate in there at a certain figure and take out Monetary stock for it, which allowed him his promotion stock, but I was not allowed mine.

"The Witness (Continuing). Mr. Woodward sent me that $5,000 at the time the first payment was made of $1,000 into the Monetary; I think all my payments were in checks; I have not the checks; it was before the fire, and the checks were destroyed in the fire so that I have not got any of them. I saved absolutely no books showing the payments" (Trans. p. 179).

The witness Mayo further contended that the plain agreement between Reichart and the Trust Company by which the latter received 1,175 shares of Land Company stock in consideration of all claims for past services, and Mr. Cutting's subsequent agreement to buy $10,000 worth of the Land Company's bonds, included the wholly indefinite, uncertain and indefinable stipulation on the part of Cutting to further finance the Land Company when the proceeds from the sale of those bonds had been exhausted, and he alleges that the consideration for such a promise on the part of Cutting was the turning over to him of a controlling interest in the stock of the Land Company. Now, the fact is and must have been known by Mayo at the time he so testified (Trans., pp. 147, 174, 175) that Mr. Cutting never received but 2,350 shares of bonus stock from Reichart at the time of the purchase of $10,000 worth of bonds on May 3, 1905 (Trans., p. 189). Had Cutting controlled the 10 shares of qualifying stock in each of the directors, he would have had but 2,406 shares out of the 2,501 shares necessary to control the Land Company at the time Mayo testifies he agreed to carry an indefinite obligation to finance the Land Com-

pany in behalf of the other stockholders. Such an agreement would obviously inure to the benefit of Reichart who had 1,175 shares left and to the Lewis stock 250 shares as well as to the 1,175 shares owned by the Trust Company. In other words, the same claim could have been made by these interests when Cutting, on August 29th, 1906, took the option on the Reichart stock at $1.00 per share and an option from Dr. Lewis on November 5th, 1905, at the same price. It appears inferentially that he did not exercise these options until February 28th, 1906, after he had bought the Trust Company stock in December 20, 1905, from the fact that on that date he had issued to him 4,977 shares of Land Company stock in one certificate (Stock Certificate book of Land Co., S. of E., 279).

The entire record shows that Cutting dealt openly with the Trust Company in the transaction of December 20th; all of the directors, including Morgan and Betz, who are shown to have been disinterested parties, the one a purchaser of his stock in the Trust Company for cash, and the other an incorporator and director from the date of its organization, had knowledge of it. Mayo, though not present at the meeting, learned of it the next day according to his own testimony; (Trans., p. 146), and learned that the company, having no immediate use for the money, would probably loan it back to Mr. Cutting. Mayo has been a director of the Trust Company from the date of its organization to the present, except for a period of about four months from January to April, 1905, during which time the transaction respecting the transfer of 1,175 shares of stock from Reichart to the Trust Company took place, and of this

he had full knowledge and notice as he expressly admits. His testimony in this regard is as follows:

"Q. Now, I find here on page 27 of the minute book the following: 'Meeting of the Board of Directors of the Monetary Trust Company, held at the office of the company, March 27, 1905, pursuant to notice.

" 'Present: H. C. Cutting, President; W. J. Morgan, Vice-president; Fred Reichart, and Albert Betz, Secretary.

" 'Absent: F. A. Woodward, who had been duly notified of the time and place of the meeting. A quorum being present the president called the meeting to order.

" 'Mr. Morgan offered the following resolution:

" 'Whereas, the executive committee of this company some time ago entered into an oral arrangement with Mr. Reichart, who was then not a director of this company, in connection with the carrying out of the Point Richmond Canal & Land Company's project; and

" 'Whereas, this company having by reason of its inability to sell bonds of the Point Richmond Canal & Land Company, and for the further reason that the Hackett Dredger could not do the work, failed to carry out its part of the agreement with said Reichart; therefore, be it.

" '*Resolved,* That in consideration of said Reichart transferring to the Monetary Trust Company 1,175 shares of the capital stock of the Point Richmond Canal & Land Company, said Reichart and said canal company are hereby released from transferring any further shares of said stock in this company, the consideration for said shares so transferred being for past services rendered by this company, and for such services as it may be called upon to render in the future.'

"A. That was in pursuance of the arrangement that was finally made as to how the Point Richmond stock should be divided. Mr. Cutting took control of it and received 50 per cent and more of the stock without any expense himself, and Mr. Reichart intended to retain one-quarter, and the Monetary was given one-quarter.

"Q. (Reading) 'Said resolution being duly seconded was unanimously adopted. Mr. Fred Reichart informed the Board of Directors of this company that, having failed to carry out its arrangement with the Point Richmond Canal & Land Company, said arrangement had become null and void; and, thereupon, on motion of W. J. Morgan and second of Albert Betz, upon vote of Cutting, Morgan and Betz said arrangement was declared null and void; Mr. Reichart being excused from voting. There being no further business before the board, the meeting upon motion duly made and seconded, adjourned.'

"The Court: What was that that was revoked, that had never been carried out.

"Mr. Hart: The original contract for the purpose of carrying out the canal business, the business of the canal company.

"The Court: What contract?

"Mr. Hart: The oral contract, as they state here, that the Monetary Trust Company was to raise the funds for the purpose of improving the property. As a matter of fact, if your Honor please, there never was any contract in writing on that subject, so far as I know.

"Q. Do you know of any, Mr. Mayo? A. No; that arrangement that you have just read from the minutes superseded all previous arrangements, as I understand it; the Monetary was given this one-fourth; Mr. Cutting one-half and Mr. Reichart got his one-quarter. That was the end of the proposition. That was the way by which the Monetary Trust Company became the owner of this 1,175 shares of the Canal Company stock. From that time on the Monetary performed its services and was not required to do anything further. If I was at the meeting, I was aware of the passage of this resolution.

"Q. Well, it was on March 27, 1905.

"The Court: Was he present at the meeting?

"Mr. Hart: He had resigned at the meeting of January 7th. I am asking him if he was aware of that fact.

"The Witness: I consented to that distribution of the stock. I do not remember how much stock Mr. Cutting got at that particular time—actually got of the canal company. I know he was given control;

by that, I mean he got a majority. I don't know how the stock was issued. I know the arrangement we reached at the time."

The minutes show that Mayo was present at the annual meeting of stockholders held November 10, 1909, and that he was unanimously elected to the Board of Directors of the Trust Company. No annual meeting of the stockholders of the Trust Company appears to have been held in 1908. But at the meeting in 1907, held pursuant to printed notice, and with a majority of the stock represented, "The minutes of the former annual meeting were read and approved." The "former annual meeting" refers to the meeting of stockholders for the year 1906, called pursuant to a resolution passed at a meeting of the Boarmd of Directors held on September 3d, 1906, (S. of E., p. 193), and being the annual meeting to which the minutes of the stockholders' meeting of November 10, 1906, held "pursuant to adjournment" may be properly referred. Here we find, therefore, in the minutes of the stockholders' meeting of September 28, 1907, legally called and convened, an express ratification of the transaction whereby the option previously given by the Executive Committee to Mr. Cutting to purchase the stock in controversy was ratified and approved, and whereby "all the actions" of the Board of Directors and its officers since the last stockholders' meeting to the date hereof, "were likewise" unanimously ratified, approved and confirmed.

ESTOPPEL AND LACHES.

It will not be denied that within a few months follow-

ing the transfer to Cutting by the Trust Company of the 1,175 shares of Land Company stock in question, Cutting entered into the possession of the real property at Point Richmond, and while the same was of little or no value over and above the mortgage indebtedness represented by the bonds held by the Mintzer and Tuxbury estates, commenced the expenditure of large sums of money in its improvement. The testimony of Cutting is undisputed in the record that he spent over $50,000.00 upon the land before any sales of lots were effected (Trans., p. 203). In all, through his efforts, some $150,000 has been spent in improving the property, since he has acquired, as he has thought, all of the issued capital stock of the Land Company. His testimony in regard to the condition of the property in 1906, and at the present time which is also uncontradicted, is as follows:

> "Mr. Hart: Q. Did you make estimates of the amount of money that would have to be spent on the property in order to make it of a value greater than the bonded indebtedness? A. Yes. I made such investigation for some time before I purchased the stock. When I say some time, I mean it covered the space of time during the investigation. For the purpose of making the property in a condition that would enhance the value of it at all above the bonded indebtedness, there would have to be a channel dug in there so that shipping could come in and then the property had to be filled so that it would be above the high water line; and of course it would ultimately have to be filled to the city grade, whatever the grade was established by the city. The grade or what is known as the base line had not been adopted at that time. Richmond was not incorporated at that time.
>
> "The Witness: (Continuing.) I made an estimate of the expense of the making of this channel. I went over there a good many times, and figured on it—a lot of times—how to handle it, before I purchased

the stock. I don't think I have ever figured it up exactly, the amount of money that has been spent on this property, but I should think in the neighborhood of $150,000. I spent the money. The improvements that have been placed upon the property for this expenditure have been a canal cut for a distance of about 3,000 feet. There has been pretty near 100 acres filled in and one street 110 feet wide has been graded for 4,000 feet across the property and the sewers have been put in on some of the streets, and Richmond Avenue on one side of the property has been macadamized up in very nice shape, and then there have been some buildings—there have been two canals built, two side canals. It is a hard matter to estimate the present value of the property, I should think it is worth a million dollars. There has been a good deal of this 100 acres contracted for in lots. The books of the Point Richmond show the sales that have been made. No dividend has ever been paid upon the stock. There is still a bond issue out that is due the 1st of January, 1915. I think about $40,000 worth of bonds altogether have been paid and cancelled. The remainder are unpaid. They are due the 1st of January, 1915. * * * (Trans., pp. 197, 198.)

"The Witness: After I obtained these 1,175 shares of stock it was about six months or about four months before I commenced to operate actively with the Point Richmond Canal & Land Co.

"Q. And when acting actively, you had a sale of the property of the company, didn't you. A. No, not until a long time afterwards; I put in over $50,000 before there were any sales made; and then they did not amount to anything.

"I did not have a sale in March or April, 1907.

"I had all the stock before I put up the $50,000. If I had not had it, I would not have put it up. I got all the bonds that were left. I had purchased 27 of the 64 bonds before that.

"Q. When you say you put in $50,000, you got bonds for all the money you put in, didn't you? A. No; after the bonds were exhausted, I still put up quite a bit of money" (Trans., p. 239).

The character of the work done, and a knowledge of the growth that the City of Richmond which took place

between the spring of 1907, and the date of the filing of this suit (February 19, 1913), of which the Court will take judicial notice, are facts of such notoriety, that it will not be in the mouths of the appellees to claim an ignorance of the changed relationship of the appellant to the Land Company upon which we base our claim of estoppel. Since the appellee has taken over the property of the Land Company, he has contracted for the sale of lots to an amount of about $500,000, upon which he has received payments amounting to approximately $75,000 or $80,000 (Trans., p. 237). Mayo has repeatedly asked him during this period, how he was getting along. In *Penn Mutual Life Ins. Co. v. Austin* (168 U. S., at p. 698), the Supreme Court has said concerning the application of the doctrine of laches:

> "The reason upon which the rule is based is not alone the lapse of time during which the neglect to enforce the right has existed, but the changes of condition which may have arisen during the period in which there has been neglect. In other words, where a Court of Equity finds that the position of the parties has so changed that equitable relief cannot be afforded without doing injustice, or that the intervening rights of third persons may be destroyed or seriously impaired, it will not exert its equitable powers in order to save one from the consequences of his own neglect."

It would indeed be difficult to measure the indirect injury already done to the contract purchasers from the Point Richmond Canal and Land Company, and which must of necessity follow from this litigation, if the plaintiffs are allowed to prevail and attempt to force a return of the *statu quo* of 1906, and we urge with great confidence that no such compelling equities have been shown in this case, where neither of the plaintiffs have shown

sufficient interest in the maintenance of the suit to testify in their own behalf, and where neither have supported their allegations that they are the *owners of the stock* in the Trust Company to which they lay claim.

In *Oil Company v. Marbury* (91 U. S., at p. 593), the Court was considering the application of the rules of laches to the case when the complainant sought to have a transfer of oil properties by the corporation to one of its directors set aside. The transfer had been made in 1867 and the bill was filed in 1871. The Court said:

> "While a much longer time might be allowed to assert this right in regard to real estate whose value is fixed, in which no outlay is made for improvements, and but little change in value, the class of property here considered, subject to the most rapid, frequent and violent fluctuations in value of anything known as property, requires prompt action in all who hold an option, whether they will share its risks, or stand clear of them.
>
> "The case before us illustrates these principles very forcibly. The officers, and probably all the stockholders, who were not numerous, knew of the sale as soon as made. As there was no actual fraud, they knew all the facts on which their right to avoid the contract depended. They not only refused to join the defendant in the purchase when that project was tendered them, but they generally refused to pay assessments on their shares already made, which might have paid this debt."

Considering the speculative nature of the land transaction in which the Trust Company and its stockholders were engaged before and at the time of the sale of the 1,175 shares in question to Mr. Cutting, the amount of money necessary to develop the property before it could be put on the market, the amount of the encumbrance against it, the interest to be met each year, and the maturity of the bonds on January 1st, 1915, and the oppor-

tunity afforded to and refused by the Trust Company to levy an assessment to carry their share of the expense of improving the property (trans., pp. 227, 228 and 190, 191). The case at bar stands, we submit, on all fours with the case of *Oil Co. v. Marbury.* To the same effect, see *Grymes v. Sanders,* 93 U. S., p. 62.

RATIFICATION.

While we desire to stand firmly upon the showing in the record that the sale of the 1,175 shares of Land Company stock by the Trust Company to Mr. Cutting under the option testified to by Messrs. Wernse, Betz, and Morgan has been expressly ratified in the manner just mentioned, we may properly go further, out of an abundance of caution, and urge upon the attention of the Court the fact that the transaction ultimating in the transfer thereof as shown by the minutes of the meeting of December 20, 1906, was subject to ratification by acquiescence and the failure to disaffirm within a reasonable time. There being no proof of actual fraud, all the facts of the case being within the knowledge of all of the stock interests represented by the appellee, The Monetary Trust Company, a legal obligation to pay for the stock having been incurred by Mr. Cutting, likewise with knowledge from the beginning of Mayo, and therefore of the Woodwards, if it be held that the record shows that either of them are the legal or equitable owners of any stock in the Trust Company, the implication of a ratification by the lapse of over six years, would seem to be conclusive.

That a ratification will be implied under such circumstances seems to be clear.

In the case of *Reed v. Hayt* (opinion in 17 N. E., 418), the action was by the plaintiff to recover the purchase price of stock, sold and delivered to the defendant under a tripartite agreement between the parties and the corportion issuing the stock, reciting that the plaintiff was the owner of 4,550 shares of fully paid and non-assessable shares of the company. The defendant in his answer set up that the plaintiff was not, and never had been, the owner in good faith of 1,622 shares of the stock; that the same had been issued to plaintiff, the president of the company, in consideration of advances due him from the corporation, under the authority of a resolution of the Board of Directors at a meeting called without notice and at which but three members, including the president, (the plaintiff) out of five were present. The defendant, admitting notice of the facts, took upon himself to sustain the following proposition: (1) There was no consideration for the transfer; (2) it was invalid, because the plaintiff, being a trustee of the company, could not make a quorum, when without him there would be no quorum competent to transact business in the interest of himself personally; and (3) the meeting was invalid for want of notice to all the trustees.

After deciding that the first position was against the fact, the Court says:

> "As to the second position, its merits rest upon the fact that the plaintiff, as a trustee, could not act for the company in a transaction in which he received a benefit. This, however, is to be limited by further saying that his beneficiaries could, if they thought it to their interest, ratify his act, or, at their option, avoid it. The company was a party to the agreement in this case, and would be held to have ratified the issuing of the certificate of the shares, if

it were not that their execution of the agreement was made by the plaintiff himself. The company, as appears by the plaintiff's testimony, forthwith went into the control of other persons; the plaintiff resigning, and the defendant taking the office of president. There was no avoidance of the issuing of the shares, and the assent and tacit ratification by the company was guided by the defendant himself. The other beneficiaries were stockholders. None of these have in fact assailed the issuing of the certificate. Whether they might do so in a proper action should be considered in view of the fact that the defendant was to become a stockholder upon performance of the agreement. He did, upon part performance, receive some of the shares of another kind, as to which there was no dispute. At the end of nine months from the making of the contract, he learned the facts of the issuing of the stock, and after that he took the benefit of an extension of time of performance, for such, substantially, was the option that will be hereafter referred to, until the 7th of June. The plaintiff's position, in the mean time, was that he could not enforce his claims against the company for the advances. This made it necessary for the defendant, as stockholder, to avoid at once the action of his trustee, the plaintiff, unless he wished to affirm the validity of the shares. No steps were taken towards disaffirmance, and he consequently, in effect, affirmed. If he did not disaffirm, there is no reason for supporting a defense that some other stockholder might therefore disaffirm. Such a possibility cannot be entertained in favor of the defendant, in view of his own acts."

In the suit at bar, there will be no contention that all of the stock interests in The Monetary Trust Company, including the plaintiffs', if they have any, or Mayo's if they have none, have not remained the same from the time of the sale of the 1,175 of Land Company stock to Cutting in December 20, 1906, to the present time. So far as the Trust Company is concerned, it is bound by the doctrine of ratification for failure to disaffirm, to

the same extent as was the defendant, the then president of the corporation in *Reed v. Hoyt*; and clearly the plaintiff will not, under the authorities previously cited be allowed to maintain an action where the Trust Company could not, against Cutting owning but one-third of the stock. The Court in *Reed v. Hayt,* continues:

> "Similar considerations apply to the third position, that the meeting of directors was invalid for want of notice to them. Besides the mere resolution at the meeting, the transaction had been executed, the plaintiff had received the certificate, and had satisfied his demand against the company. This executed transaction could not be opened by any one, except through the action of a Court of equitable jurisdiction, and it would require that the plaintiff be placed in his original position. So far as the proof of the defendant discloses, every one interested had countenanced or ratified the plaintiff's dealing with the stock as owner, with a knowledge of the facts, and the action referred to would not lie."

Again the record of a meeting in the minute book of a corporation is notice to its members (*Ashley Wire Co. v. Illinois Steel Co.,* 56 Amer. St., at p. 192).

Upon plain principles of agency, notice to Mayo was notice to the Woodwards, and in the absence of fraud on the part of Mayo as trustee known and taken advantage by Cutting and none is charged against Mayo by the Woodwards, the *cestui que trustent* are conclusively bound by their own acts of affirmance and acquiescence. Where a trustee deals with and handles trust property as his own—either directly or indirectly, the transaction is not void, but voidable, and it may be ratified by the beneficiaries expressly or by long acquiescence.

Hammond v. Hopkins, 143 U. S., 224.
Hoyt v. Latham, 143 U. S., p. 553.
Foster v. Mansfield, etc., R. R. Co., 146 U. S., 88, 100.

THE COURT ERRED IN NOT GRANTING THE PETITION OF THE DEFENDANT FOR A RE-HEARING

(Trans., pp. 67-89.)

This suit was tried below by Gen. Hart for both the Trust Company and Mr. Cutting. Near the close of the testimony, Gen. Hart offered himself as a witness to prove the facts surrounding the giving of the option to purchase the 1,175 shares of Land Company stock by the Executive Committee of the Trust Company to Cutting, and he was confronted by the rule of Court which would force him to elect between appearing as a witness and exercising his right to argue the case and he elected the latter.

After the submission of the cause, the defendant discovered an agreement dated March 28, 1905, between The Land Company and Cutting having reference to his negotiations to buy the $10,000 worth of bonds of that company for improvement purposes. This agreement, together with that between Reichart and Cutting of May 3rd, 1905, both executed following the transfer on March 27th, 1905, of the 1,175 shares of Land Company stock by Reichart to the Trust Company in discharge of all claims of the latter for past services, was newly discovered evidence material to controvert the fact that these bonds were sold Cutting in the manner and form, and under the indefinite terms and conditions testified to by Mayo. Other newly discovered evidence consisted in two pass books showing deposits of money received by the Land Company from Cutting in the sale of bonds under the contracts of March 28th, and May 3, 1905, the one having

been in use to the date of the great fire (April 18, 1906), showing a deposit of $7,500; and the other in use afterwards showing deposits of money, received from Cutting likewise on account of sales of bonds, to an amount of $42,000. A satisfactory excuse, we submit, was offered for the failure to produce this evidence at the trial, (affidavit of H. W. Wernse, Trans., pp. 86-89).

General Hart in his affidavit in support of the petition, after stating the facts surrounding the granting of the option, states that up to September or October, 1906, he had seen but little of Mr. Cutting, who had paid but little attention to business matters in San Francisco before some time in 1907; that up to the time of the sale of the stock in question to Mr. Cutting, he had never been his attorney except in a Justice Court case; that his connection with him since has been as counsel for the Land Company, the Trust Company and the Richmond Dredge Company; that he has been aware from the beginning of the transactions in connection with the organization of the Land Company, and well acquainted with the character of its real property as swamp or overflowed land, and that its value depended entirely upon its improvement, and when improved could only become marketable, as the Town of Richmond might grow; and that he knew nothing about the sale of the stock in controversy being questioned up to the time of the bringing of this suit.

While there is a great paucity of detail in the record of those facts which would go to further negative any charge of actual fraud on the part of Mr. Cutting, and to establish an estoppel *in pais* against the Trust Company and the plaintiffs suing its be-

half, to question the validity of the sale at this time, we are satisfied that this should be charged to the learned trial judge who from the first seemed to conceive that the validity of the transaction turned entirely upon the question of constructive fraud, rather than to a lack of zeal on the part of counsel for Mr. Cutting. The fact, however, that General Hart has become a substantial beneficiary of the decree, declaring the Trust Company the owner of 1,175 shares of the Land Company's stock, and as such has been forced into the position of an appellee here, gives us great confidence that our position is well taken that a re-hearing should be granted in order to give the defendant Cutting, in the Court below the fair and impartial trial which it is the spirit of our law should be accorded him. Especially is this true since the position which Gen. Hart assumed in taking charge of the defense is as thoroughly compatible with an honest belief on his part and Mr. Cutting's that the transaction of December 20, 1905, was a fair and proper one, as it is with the contention of the plaintiffs below that it was fraudulent. If, therefore, we have failed in satisfying this Court that the record, as it stands, shows the suit to be without equity, we respectfully request an earnest consideration of our application for a re-hearing.

Without intending anything by way of disparagement of Gen. Hart, (the record he is shown to have made in this case would not justify this on the slightest degree), we nevertheless believe that the same grounds which exist for the rule preventing an attorney or solicitor becoming a purchaser in conflict with his duty to his client, justifies our position in this behalf. As stated by Judge

Deady in *Manning v. Hayden,* 5 Sawyer (U. S.), 360, 381, 16 Fed. Cases No. 9,043, at page 653:

> "This rule is alike necessary to preserve the dignity and integrity of the legal profession, and to protect the interests of a dependent and confiding clientage; and in the enforcement of it Courts will not hesitate, because the injury to the client does not fully appear, or a positive intention on the part of an attorney to gain an advantage is not shown."

The Record at no Point Presents a Case of Actual Fraud

We think it will be conceded by the appellees, the Woodwards, that in order to have made out a case of actual fraud against Mr. Cutting, it was necessary to show by clear and positive proof that Mr. Wernse and Gen. Hart were guilty of *fraudulently* combining with Cutting in the transaction of December 20, 1906, and that in the absence of such proof their case must fall. A party seeking the rescission of a contract upon the ground of misrepresentation must establish his case by clear irrefragible evidence.

Farnsworth v. Duffner, 142 U. S., p. 48.

A Court of Equity will not annul or correct a written instrument for fraud, unless the evidence be clear, unequivocal and convincing; nor can it be done on a bare preponderance of evidence which leaves the issue in doubt.

United States v. Maxwell Land Grant Co., 121 U. S., p. 381.
United States v. Budd, 144 U. S., 154.
United States v. San Jacinto Tin Co., 125 U. S., pp 299, 300.

A suspicion of want of good faith is not sufficient.

United States v. Hancock, 133 U. S., 197.
Hoffman v. Overbey, 137 U. S., 472, 473.

The undisputed testimony of Mr. Cutting is that he did not begin operations in the further development of the property of the Land Company until the spring of 1907, and he did not take Wernse into his employ until that time (Trans. p. 234, 239). He further states in his petition for a re-hearing that at the time of the alleged fraudulent sale, he was a non-resident of California, living, and engaged in conducting a large mercantile enterprise at Tonopah, Nevada; that he had no personal counsel in San Francisco at the time and that Gen-Hart did not become counsel for him until a much later period (Trans., p. 70).

At the trial below much was attempted to be made of the charge that Mr. Cutting had not paid more than an aggregate of some $1,800 on account of his $5,000 subscription to the stock of the Trust Company. As previously stated, the Ledger of that company has been lost, but a re-statement of his Ledger account would show the dates and amounts of his payments for stock as follows:

H. C. Cutting paid to Monetary Trust Co. as shown by Cash Book.

1904			
June	9.	Cash	$ 250.00
Sept.	15.	"	300.00
Sept.	26.	"	239.00
Nov.	30.	"	175.00
1905			
March	27.		150.00
April	22.		50.00
"	"		40.00
May	2.		405.00
"	"		40.00

"	"	75.00
"	"	2.25
June	7.	265.00
"	6.	5.00
"	6.	20.00
July	1.	258.50
Aug.	8.	262.85
"	31.	10.00
Sept.	2.	260.00
Oct.	3.	264.00
"	25.	42.50
Nov.	1.	285.00
"	15.	77.50
Dec.	1.	193.60
1906		
Jan.	2.	193.05
Feb.	3.	190.65
March	1.	190.85
April	2.	192.65
May	7.	4.25
"	8.	2.00
"	9.	48.00
"	10.	105.00
June	1.	75.00
July	1.	75.00
Aug.	1.	75.00
Sept.	1.	75.00

Total paid by H. C. Cutting $ 4,896.65

which, after deducting amounts paid by Morgan on account of his share of office expense and which were credited to Cutting's account as follows:

Moneys paid by W. J. Morgan as shown by Cash Book:

1905				
July	5.	One-holf office expense	91.75	
	6.	a/c Exchange	10.00	
Aug	12.	One-half office expense	91.40	
Sept.	2.	" " " "	92.75	
Oct.	14.	" " " "	82.00	367.90
				$4,528.75

shows that the latter has paid in $4,528.75 on account of his subscription. We have heretofore called attention to the fact that for this stock has been issued to the amount of only 448 shares. The par value of Trust Company stock is $10.00 per share.

Much will no doubt be attempted to be made of the fact that the Board of Directors loaned back to Mr. Cutting the money evidenced by his check for $1,175 given at the time of the purchase of the stock in question; as well as of the loan of $1,093 which the Company received from the transaction with the Pacific Underwriting and Trust Company.

There are two answers to this: First, it would be a travesty upon business organization generally to treat these transactions on a par with those of legitimate trust companies generally. The form of its original organization, with which Mr. Cutting was not concerned, the fact that in general it has not engaged in a trust company business since its organization, must, it seems to us, be taken into consideration as lessening the offense of the Trust Company in making an unsecured loan to its President. Besides this, the character of Mr. Cutting's credit may be taken into consideration where the record shows, as it does here, his ability to finance as heavy a matter as the Land Company in the manner shown. Mr. Cutting's instinct of conservatism is also illustrated by his forcing the cancellation of the former issue of promotion stock of the Trust Company to which allusion has previously been made. Again the plaintiffs cannot complain, since Mayo knew from the beginning of the proposition to loan Mr. Cutting back the money. The following occurs in the record in connection with his testimony

to the effect that Wernse's services have not been charged to the Trust Company since 1907:

> "The Court: Q. After the spring of 1907, his services have never been charged to the Company? A. No.
>
> "Q. It was only prior to that time? A. Prior to that time, and no expense has been charged to the Monetary Trust Company. And the reason why I borrowed the money from the Monetary Trust Company was so as to avoid the expense of having some one to look after it. I owe the money to the Monetary Trust Company, and I am willing to pay it any time it is called for, but I might as well use it and pay 8 per cent" (Trans., p. 234).

We may well conclude this phase of the question by suggesting to the Court that men of large imagination who embark in enterprises such as the development of the canal and harbor project of the Point Richmond Canal and Land Company is shown to involve by instinct are not the mean and petty cheats that the plaintiffs charge Mr. Cutting with being; and we confidentially assert that the record does not contain a scintilla of evidence showing or tending to show that any undue advantage of or oppressive measures against the Trust Company were taken or used by Mr. Cutting to effect the transaction of December 20, 1906.

But, in the second place, if the Court should feel that Mr. Cutting's actions in borrowing the funds of the Trust Company are open to criticism, still these actions cannot be considered as proof of actual fraud in connection with the purchase of the 1,175 shares of stock in controversy. Because a party has done wrong at one time and in one transaction, it does not necessarily follow that he has done like wrong at other times and in other transactions.

United States v. Budd, 144 U. S., 164.

Finally, we submit, there is nothing in the whole record which makes out a case of actual fraud entitling the plaintiffs to maintain this suit in behalf of The Monetary Trust Company, either for an accounting or for a decree annulling the sale of the 1,175 shares of Land Company stock in controversy, and we respectfully represent that the bill should be dismissed.

Respectfully submitted,

JACOB M. BLAKE,
Solicitor for Appellant.